IN THE

Supreme Court of the United States

October Term 1945

No.

LEO S. SACHAROFF,

Petitioner,

against

EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.

EMANUEL SCHIFFMAN,

Petitioner,

against

EDWARD S. CORSI, as Industrial Commissioner, and ABRAHAM H. GOODMAN, as Deputy Industrial Commissioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

POINT I

This Court has Jurisdiction.

Constitutional questions were considered by the Special Term, the Appellate Division and the Court of Appeals. The opinions are eloquent in that regard. In the official

report appearing at 294 N. Y. 350, the contentions of counsel disclose that the petitioners presented for the reflection of the court both the due process and equal protection clauses of the Constitution.

There remains the matter of finality. It is true that the Court of Appeals "remitted to the Special Term for further consideration in accordance with this opinion". But as we understand the jurisdictional philosophy the question is not whether an order or judgment was denominated final by a state court but whether a particular right was finally adjudicated so that it can no longer be considered by the state. We rely upon the following excerpt from the determination in *Dept. of Banking* v. *Pink*, 317 U. S. 264, where the court wrote:

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Ct., 278 U. S. 575, 73 L. Ed. 515, 49 S. Ct. 94; Cheltenham & A. Sewerage Co. v. Pennsylvania Pub. Utility Commission, No. 160, decided October 12, 1942, 317 U. S. 588, post, 482, 63 S. Ct. 38), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court (see Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 1300, 62 S. Ct. 962)."

The procedural and constitutional questions were fully adjudicated by the Court of Appeals and are not subject to a further review. While there was a remission to the Special Term it was only for the consideration of such questions of law and fact as were initially urged but never

decided. If this case does not fall in the category of a matter fully adjudicated and not subject to review then it would be difficult to conceive of a decision not denominated final which could nevertheless be submitted to this court.

POINT II

The matter involved is of great public importance.

In the application to the Court of Appeals for leave to appeal to that court the Attorney General, representing the Industrial Commissioner, wrote:

> "It is clear from the foregoing that the issues respecting the jurisdictional extent of the Commissioner's statutory powers of removal (as more fully developed in the subjoined brief), which have never previously been passed upon by this or any other Court of this State, are of paramount public importance. The ultimate determination of those issues is obviously of great moment to the proper administration of the Workmen's Compensation Law, and accordingly should be made by this Court."

In his brief to the Court of Appeals the Industrial Commissioner observed:

> "So far as its alleged constitutional aspects are concerned, the precise situation conceived by Special Term seems not to have been considered by other courts, * * *."

Finally, and as additional evidence of the paramount importance of this matter, consider the further language used by the Attorney General in a recent affidavit:

> "The instant proceedings are in the nature of test cases. On their outcome hinges the fate of hundreds of other physicians whose cases are being held in abeyance pending the final outcome of these proceedings."

Beyond the compelling declarations of the opposition it seems clear that the issue resides in the controversy between a full hearing which this government normally guarantees to its free citizens and the species of dictatorship which is inherent in the grant of power to an administrative official to destroy the career of a physician upon what seems to him a "reasonable investigation".

POINT III

A construction of Section 13-d of the Workmen's Compensation Law which deprives an accused physician of notice of charges and a hearing at which he may defend himself on the merits and grants to the Industrial Commissioner the power of summary revocation is arbitrary and undemocratic and violates the due process and equal protection clauses of the constitution.

The statute in question reads:

> "13-d. Removal of Physicians from lists of those authorized to render medical care.
>
> 1. The medical society or board that has recommended the authorization of physicians to render medical care under this chapter shall investigate, hear and determine all charges of professional or other misconduct by any authorized physician, as herein provided, under rules and procedure to be prescribed by the industrial council of the department of labor and shall report evidence of such mis-

conduct, with their determination thereon, to the commissioner. Such investigation, hearing, report and determination may be made by the board of an adjoining county upon the request of the medical society of the county in which the alleged misconduct or infraction of this chapter occurred. The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commissioner.

2. The Commissioner shall remove from the list of physicians authorized to render medical care under this chapter the name of any physician who he shall find after reasonable investigation is disqualified because such physician (a) has been guilty of professional or other misconduct or incompetency in connection with medical services rendered under this chapter; or (b) has exceeded the limits of his professional competence in rendering medical care under this chapter or has made materially false statements concerning his qualifications in his application for the recommendation of the medical society in the county in which his office is located, or of the board designated by it, or of a board as provided in section thirteen-b; or (c) has failed to submit full and truthful medical reports to the commissioner, the industrial board, or the employer within the time limits provided in section thirteen-a, subdivision four, of this chapter with the exception of injuries which do not require more than ordinary first aid or loss of time beyond the working day or shift; or (d) has rendered medical service under this chapter for a fee less than fixed by the commissioner as the minimum rate in his locality; or (e) has participated in

> the division, transference, assignment, rebating, splitting or refunding of a fee for medical care under this chapter; or (f) has solicited, or has employed another to solicit for himself or for another the professional treatment, examination or care of an injured employee in connection with any claim under this chapter.
>
> Nothing in this section shall be construed as limiting in any respect the power or duty of the commissioner to investigate instances of misconduct, either before or after investigation by a medical society or board as herein provided, or to temporarily suspend the authorization of any physician that he may believe to be guilty of such misconduct."

The interpretation advocated by the Industrial Commissioner was frankly set forth in his brief to the Court of Appeals in this language:

> "It would seem that a hearing by the Commissioner under Subdivision 2 is not mandatory, but that in the proper exercise of his administrative discretion he may revoke for any cause as determined upon his own *ex parte* investigation." (Italics the Commissioner's.)

While we are dealing with an authorization to practice in compensation rather than a license as a physician in general, nevertheless the withdrawal of the privilege is "a consequence most severe and partakes of the nature of punishment".

Matter of Donegan, 282 N. Y. 285, 292.

It is a valuable property right which is entitled to be protected and secured under the Constitution and the laws of the State.

Matter of Bender v. *Board of Regents*, 262 App. Div. 627, 631.

The jurisdiction of the medical society under Subdivision 1, is to be exercised within the framework of certain special rules to be enacted by the Industrial Council of the Department of Labor. Under Section 10-a of the Labor Law, entitled "Industrial Council", a body of fifteen persons is formed, of which five shall represent the interests of labor, five of industry and five shall be physicians licensed to practice in the state. Subdivision 2 of that section adds that

> "The commissioner (industrial commissioner) shall be an additional member of such council and shall act as chairman thereof."

Subdivision 1 of Section 13-d grants the Industrial Council appellate powers. It provides:

> "The industrial council of the department may review the determination of such medical society or board, and on application of the physician accused must do so, and may reopen the matter and receive further evidence. The decision and recommendation of such industrial council shall be final, binding and conclusive upon the industrial commission."

Such language was intended to coincide with Section 10-a of the Labor Law, Subdivision 4-i, which provides that the Industrial Council shall

> "Review the determination of charges of misconduct where the physician accused appeals from the decision of the medical society or board which took jurisdiction in the first instance. In such cases the council may reopen the matter and receive fur-

ther evidence. And the decision and recommendation of the council shall be final, binding and conclusive upon the industrial commissioner."

In obedience to the requirements of Section 13-d of the Workmen's Compensation Law and Section 10-a of the Labor Law the Industrial Council promulgated certain rules. This is the heading; "Procedure Before Medical Societies." or "Compensation Boards of Medical Societies", Subdivisions 2-a, b and f are as follows:

"2. In any investigation or hearing before a medical society or board pertaining to the removal of physicians from lists of those authorized to render medical care under the Workmen's Compensation Law, or pertaining to the revocation of the license of a medical bureau, under Section 13-d of the Workmen's Compensation Law:

(a) The accused physician or medical bureau shall be given twenty days' notice of charges in writing, including a statement setting forth the specific section and subdivision of the law violated; the time, date and place of each alleged violation; and the time, date, and place of the hearing before the medical society or board.

(b) Stenographic minutes of such hearing or investigation shall be made and kept.

(f) The accused physician or medical bureau may, within thirty days after receipt of a copy of the medical society's or board's report, recommendation, determination and findings, file an appeal therefrom with the Industrial Council by written notice of appeal filed with the Council. Copies of this notice of appeal shall be mailed to the medical society or board, and to the Industrial Commissioner."

At the conclusion of the rules there is a statement of "General Policy of Procedural Rules" and this is the language:

> "In general, administrative adjudication, whether by the local medical society or board, or by the Industrial Council, shall be attended by procedures which assure due notice, adequate opportunity to present and meet evidence and argument, and prompt decision. It shall also be conducted according to established procedures and practices which shall assure adequate protection of right, benefits or privileges, the impartial conferring of authorized benefits or privileges, and the effectuation of the policies of the statute involved; but without undue formality."

Plainly, under Subdivision 1, an accused physician has important and well-defined rights. Certainly he is entitled to the following:

1. A notice of charges in writing.
2. A bill of particulars.
3. Stenographic minutes of a hearing.
4. Counsel.
5. The opportunity to cross-examine adverse witnesses.

Of course, in addition, the accused physician is granted the absolute right to appeal to the Industrial Council. It is provided that the Council "must" entertain the appeal. Not only that, but before the appellate body the physician may even reopen the case and introduce further evidence.

Such rights are of enormous value. They are rights which history indicates have frequently been won only after the shedding of much blood.

Before the Industrial Council a physician charged with a violation may argue his cause before fifteen men, not merely one, and these fifteen are representative of the medical profession, industry and labor. He therefore obtains a many-faceted consideration of his complaint.

Contrast these tremendously consequential privileges and rights under Subdivision 1 with the mere "reasonable investigation" prescribed by Subdivision 2. An investigation is not a hearing.

Even our adversaries cannot deny that there is a substantial variation between the procedures expressed in Subdivisions 1 and 2. There is a marked difference between a full hearing after notice and the absence of any hearing. Who, then, shall determine which physician shall have charges filed against him with the Medical Society and which hapless doctor shall be compelled to rely utterly upon the reinless caprice of the Industrial Commissioner who may one day inform him, to his very great astonishment, that his name has been stricken from the roll of doctors authorized to render medical care under the Workmen's Compensation Law—without notice, without charges in writing, without counsel, without cross-examination, without anything resembling a hearing—merely upon "reasonable investigation".

Such an interpretation of a statute, unless compelled by language unequivocal in character, is to be deplored. The courts have unhesitatingly condemned such procedure, even by an administrative body, as destructive of the principle of "fair play".

Morgan v. *U. S.*, 304 U. S. 1;
National Labor Relations Board v. *Prettyman*, 117 Fed. (2nd) 786, 790;

National Labor Relations Board v. *Sterling,* 112 Fed. (2nd) 63, 68;
Inland Steel v. *National Labor Relations Board,* 109 Fed. (2nd) 9, 20;
National Labor Relations Board v. *Sterling,* 109 Fed. (2nd) 194, 200;
Matter of Heaney v. *McGoldrick,* 286 N. Y. 38, 45;
New York Water Service Corp'n v. *Water Power & Control Commission of the State of New York,* 283 N. Y. 23;
Hilfer v. *Board of Regents,* 283 N. Y. 304, 308.

POINT IV

The decision of the Court of Appeals is at variance with its own decision in *People ex rel. Morriale* v. *Branham*, 291 N. Y. 312, and with the decision of this Court in *Morgan* v. *United States*, 304 U. S. 1.

The antagonists remain a hearing on the one hand and an investigation on the other. In the *Morgan* case this court proclaimed with ringing eloquence the doctrine of "fair play". The phrase connotes a hearing upon notice with the right of cross-examination and the opportunity to prepare and assert a defense.

In that case it was contended that a general inquiry had been instituted for the benefit of society and that the apparently arbitrary and discriminatory practices were therefore justified. The argument was rejected by this court in the following terms:

> "The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile."

The interpretation of "reasonable investigation" to mean the absence of a hearing is clearly at war with the decision of the Court of Appeals in the *Morriale* case. There the court was confronted with a statute which provided for the issuance of an order "if satisfied that such prisoner is a mental defective". Chief Judge Lehman there wrote:

> "Unless the statute provides expressly or by necessary implication that an adjudication may be made without notice to the person whose detention or restraint is sought, we may reasonably find implicit in the statute a direction that the judicial decision and decree shall be made only in accordance with due process of law after notice and opportunity to be heard."

If the Court of Appeals intended to construe "reasonable investigation" under Subdivision 2 as a denial of a hearing to which a physician would be entitled under Subdivision 1, then it not merely strikes at the foundations of our social order and our conceptions of justice but is in conflict with the aforementioned decisions of this court and of the Court of Appeals itself.

POINT V

What we understand and what we do not.

The Court of Appeals has conceded that the procedures outlined in Section 13-d are diverse. Attempted justification is sought on the theory that all physicians of the same class are accorded the same treatment. But is that true upon analysis? Let us take New York County: The hundreds of physicians authorized to render medical care in

workmen's compensation are, for revocation purposes, in the same class. The Court of Appeals certainly did not intend to say that if some are arbitrarily selected for hearing, on charges of misconduct, before a medical society while others are "investigated" by the Industrial Commissioner they were being granted the same treatment.

The only explanation we can find is that the Court of Appeals intended to say this: That all physicians in New York County are potentially liable to be selected for investigation or for hearing. But instead of order there would result chaos. Admittedly, there are no rules or regulations to define which physicians are deserving of one treatment rather than another. It would seem to resolve itself into either a grab bag or the uncertain and frequently unjust vagaries of a blind fate.

We can understand according to one group a hearing before three judges and another before one. We can understand a hearing for one group before a jury and for another a judge without a jury. We can understand variations of procedure by reason of different geographic or special conditions. We can understand any kind of diverse procedure founded upon a definite reason.

But we cannot understand the wholly fortuitous selection of physicians in the same class and in the same county whose rights and responsibilities are identical—the selection of some for a hearing with all that is implicit in the term and of others for merely a "reasonable investigation" —an expression loose, undefined and fraught with peril.

In short, the diverse procedures must be consistent with due process and equal protection. Long ago it was written

in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369, speaking of both the due process and equal protection clauses of the Fourteenth Amendment:

> "These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The language has often been approved by this court.

Truax v. *Corrigan*, 257 U. S. 312, 333;
Missouri, ex rel. Gaines v. *Canada*, 305 U. S. 337, 350;
Skinner v. *Oklahoma*, 316 U. S. 535, 541.

CONCLUSION

We respectfully submit that this is a case eminently proper for review by this Honorable Court.

Dated, New York City,
August , 1945.

Respectfully submitted,

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